

No. 11,991

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ALVA G. BLANCHARD,

Appellant,

vs.

J. L. PINKERTON, INC., a corporation, and J. L. PINKERTON,

Appellees.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

This is a clear and flagrant case of deliberate appropriation of a meritorious invention by a wanton and willful infringer.

Simple physical comparison of Plaintiff's Exhibits 5 and 12, the plaintiff's and defendants' commercial products herein, shows convincingly that *one of them was deliberately copied from the other.*

As to which one copied the other, the uncontroverted record in this case shows that appellant first thought about his invention in 1932 or 1931 [R. p. 100], and even the appellees admit that the testimony shows that the appellant made his invention in 1933, built one in 1933 and sold one in 1934 [R. p. 101], whereas appellee Pinkerton did not even start the drawings for his accused structure until the latter part of 1938, after he had seen appellant's commercial embodiment of the patents in suit [Appellant's Op. Br. p. 48, and R. pp. 24, 229 and 267.] Even Appellees' Brief (p. 4) makes no earlier claim than 1937.

When the appellee Pinkerton copied the appellant's commercial embodiment of the patents in suit in the latter

part of 1938 he did not have a patent attorney to dig up antiquated paper patents, or to build a theory of non-infringement, nor did he design his structure to resemble some prior art device.

Instead he had only the appellant's commercial device before him. Appellee Pinkerton didn't even have the patents in suit before him to try to get around them, because they had not issued in 1938 when he copied appellant's structure. The first one, No. 2,199,611, issued on May 7, 1940, and the second one, No. 2,233,395, did not issue until March 4, 1941.

Naturally, under these circumstances, appellee Pinkerton produced a Chinese copy of the appellant's patented inventions. The extent of the embarrassment of appellees' present attorney in now trying to fabricate at least a pretense of a defense of non-infringement is shown by his frank admission at page 44 of Appellees' Brief herein as follows:

"It is true that appellees' device accomplishes the same result as that accomplished by appellant's."
(Appellees' Br. p. 44.)

Appellees' unsupported assertion (Appellees' Br. p. 44) that that same result is accomplished by a different structure in a different way is mere "whistling in the dark," for appellee Pinkerton at the trial had already unequivocally admitted that his accused device operates *in the same identical way*, as was pointed out at pages 19-20, 22-23, 27-28 and 60-61 of Appellant's Opening Brief, and comparison of the claims with the appellees' accused device shows that the structures are *not* different.

A few of appellee Pinkerton's succinct and unequivocal admissions that the way of operation is the same are these:

"Q. By Mr. Jamieson: Does your valve do anything in addition to what Blanchard's does, the first one? A. No." [R. p. 282, Appellant's Op. Br. p. 27.]

"Q. The result is exactly the same? A. Yes.

Q. *And the way that result is accomplished is the same in both valves, isn't it?* A. Yes." [R. p. 284, Appellant's Op. Br. p. 28.]

Since the appellees admit unequivocally that their accused device does "*exactly*" the same work in the same way, identity of mode of operation, function and result are proven by appellees' own admissions. It remains only to compare the elements of the claims to show that the structures are the same in order to complete the conclusive showing of infringement.

The First Patent in Suit No. 2,199,611.

Claim 1 of this patent is typical, and representative. Embodiment of all of the elements of Claim 1 of this patent in appellees' accused device is *clearly, unambiguously and conclusively* shown as follows:

A Housing.

This element is shown at 1 in Figures 1 and 2 of Exhibit 10. It is described at lines 46 to 48 in column 1 of page 1 of the specification of this patent in suit and infringement of it is clearly shown at page 64 of the Record herein.

Clearly, appellees' accused structure includes "a housing."

A Plurality of Outlet Passages Through Said Housing.

These outlet passages are shown at 8 and 9 in Figure 2 of Exhibit 10, showing defendants' accused structure which clearly meets this element of claim 1 of this patent in suit.

A Valve in Each of Said Passages.

These valves are shown at 15 and 16 in the appellees' accused structure in Figure 2 of Exhibit 10.

This element of claim 1 is described at lines 7 to 11 in column 2 on page 1 of the specification and infringement of it is fully shown at page 64 of the Record on this appeal.

Said Valves Having Slots of Varying Lengths in One End to Determine the Order in Which They Are Opened.

Infringement of this element by appellees' accused structure was fully shown at pages 15 to 20, inclusive, of Appellant's Opening Brief, and it is not necessary to repeat here what is pointed out there.

It is sufficient to point out here that appellees did not reply to pages 15 to 20, inclusive, of Appellant's Opening Brief in Appellees' Brief.

Obviously this element of claim 1 is clearly infringed by appellees' accused structure.

A Pin Through Said Slot.

Infringement of this element of claim 1 was equally clearly pointed out at pages 21 to 25, inclusive, of Appellant's Opening Brief. Appellees did not reply to these pages of Appellant's Opening Brief in their brief, either.

Clearly infringement of this element has been established by appellant and has not been disproved by appellees.

Operated by a Lever Fulcrumed Within Said Housing.

Obviously the two parts of the pin 25 in the appellees' accused structure are operated by lever 20 and lever 20 is fulcrumed at 24 within the housing 1.

Appellee Pinkerton admitted that his accused lever does substantially the same work in substantially the same way as follows:

"Q. Referring to this Exhibit 5 and our Exhibit 12, would you say that the lever arms do the same work in those two in substantially the same way?
. . . A. Yes." [R. p. 271.]

A Float on the End of Said Lever.

Float 33 is attached to the end of lever 20 by pin 34. Appellee Pinkerton also admitted that their float works substantially the same as the float of this patent in suit.

"Q. Does your float work substantially the same as the float on Blanchard's? . . . A. Yes." [R. p. 271.]

Whereby Said Valves Are Opened One at a Time in Sequence, Responsive to the Downward Movement of Said Float.

This element is described and explained at lines 7 to 17 of page 2 column 1 of the specification of this patent in suit and infringement of this element is shown fully at pages 65 to 66 of the Record on this appeal.

Also the appellee Pinkerton admitted that the appellees' accused structure operates substantially the same as that of this patent in suit. [R. p. 271, *supra*.]

It is quite clear that the plurality of valves of appellees' structure are opened one at a time, in sequence and in response to the downward movement of float 33. Clearly this element is present in the appellees' accused structure.

This clear showing that the structure of appellees' accused device is the same as, or the equivalent of, the elements of this claim, coupled with the appellees' unequivocal admissions that the mode of operation, function and result of appellees' accused device is the same as that patented by this claim, proves conclusively that appellees' accused structure is an infringement of claim 1 of this patent in suit No. 2,199,611.

Claims 2 and 5 of Patent in Suit No. 2,199,611.

Space limitations in this brief do not permit similar comparison of claims 2 and 5 of this patent in suit No. 2,199,611 with appellees' accused structure but such comparison will show that claims 2 and 5 are equally clearly and effortlessly infringed, as was fully pointed out at the trial, in the evidence and in Appellant's Opening Brief.

The Second Patent in Suit No. 2,233,395.

Nowhere in the record of this case, nor in Appellees' Brief, do appellees even attempt to show non-infringement of this patent in Suit No. 2,233,395.

Appellees have never dared to compare the elements of claim 1 of this patent in suit No. 2,233,395 with their accused structure because they *know* that this claim "reads on" their accused structure and covers it fully.

Infringement of claim 1 of this second patent in suit, No. 2,233,395, is so clear that, as predicted at page 53

of Appellant's Opening Brief, appellees did not deny it in their brief.

For the convenience of the Court appellant will briefly point out this clear infringement of claim 1:

A Safety Apparatus for Boilers Including the Combination of.

Appellee Pinkerton admitted on cross-examination that the advantage of his accused structure over the non-infringing Exhibits "E" and "F" was "safety for boilers." [R. p. 273.]

A Fuel Supply Conduit.

This is shown at 20a in Figure 1 on the right hand side of Plaintiff's Exhibit 8 and at 20a in Figure 2 on the right hand side of Plaintiff's Exhibit 9. Clearly this element of Claim 1 is present in the appellees' accused structure, as was pointed out at page 72 of the Record herein.

A Valve in Said Conduit.

This is described at lines 37 to 38 in column 2 on page 1 of the patent in suit and it is shown at 20 on the right hand side of Figure 1 in Exhibit 8. It is also shown in detail in Figure 2 on the right hand lower drawing in Exhibit 9.

This part of appellees' accused structure is identical with the appellant's patented structure, as is seen by comparing the two structures on the opposite sides of each of these Exhibits 8 and 9. This was pointed out fully at page 72 of the Record herein.

Means for Yieldingly Holding Said Valve Open.

This is shown at the spring 77 in Figure 2 on the right hand lower side of Exhibit 9. This spring 77, mounted on the bottom of the chamber in which it is situated and urging upwardly against the bottom of the member 73, holds the valve 75 off of its seat 76, and hence in the open position shown in Figure 2 in the lower right hand side of Exhibit 9.

This structure is likewise identical with the appellant's structure shown in the patent in the lower left hand side of Exhibit 9. It is described at lines 17 to 18, column 2,

page 2 of the specification and infringement is fully shown at pages 72 to 73 of the Record herein.

A Compartment.

This compartment is shown at 72 in Figure 2 in the lower right hand side of Exhibit 9. It is described in lines 12 to 14, 26, 32, 36 and 38 to 39 in column 2 on page 2 of the specification and infringement is shown at page 73 of the Record.

A Diaphragm.

This, or its equivalent, is shown at 73 in the lower right hand side of Figure 2 of Exhibit 9. The particular mechanism that is used by appellees is a leather cup that effects a positive seal and yet has a sliding fit so that it does not permit fluid to get past it. Similarity and equivalency of this structure and the Blanchard diaphragm was shown by appellant at pages 73 and 271 of the Record.

On cross-examination appellee Pinkerton admitted that his leather cup acts as a seal and that it does the same work in substantially the same way as the Blanchard diaphragm shown in this patent in suit as follows:

“Q. Did that leather cup act as a seal? A. Yes.

Q. Do you consider that an equivalent or the same thing as the Blanchard diaphragm? A. The same thing, no.

Q. What? A. I can't call it the same thing.

Q. Do they do the same work in substantially the same way? A. I would say yes.” [R. p. 271.]

A Protective Liquid for Said Diaphragm in Said Compartment.

This protective liquid fills the compartment 72 above the sealing means 73 and protects the sealing means from the deteriorating effects of the steam in the boiler. It is described at lines 18 to 32 in column 1 on page 3 of the specification of this patent in suit and infringement is shown at page 73 of the Record on this appeal.

Connections Between Said Diaphragm and Valve.

This connection is shown in the lower right hand corner, Figure 2, of Exhibit 9 at 74, which is a rod connecting the member 73 with the valve 75 in the same

manner that the similar parts in the appellant's structure, shown opposite, are constructed and operated.

This is also described at page 74 of the Record and infringement is fully shown there.

**Means for Supplying Fluid Under Pressure to Said
Compartment for Flexing Said Diaphragm and
Moving Said Valve to Closed Position.**

Infringement of this element of claim 1 of this patent in suit, No. 2,233,395, was fully shown at pages 54 to 62, inclusive, of Appellant's Opening Brief. Appellees have not replied to this in any way in their brief and therefore infringement of this element stands admitted because it was proven by appellant and not denied by appellees.

That the "means" referred to in this element of this claim cover the means clearly shown in the description of the patent specifications as pointed out at pages 54 to 62, inclusive, of Appellant's Opening Brief, has been twice held by this court in late leading cases as follows:

In *Petersen v. Coast Cigarette Vendors*, 131 F. 2d 389, this Court, speaking through Judge Wilbur, said at page 391:

"This (35 U. S. C. A. 33) only requires that the claims point out the invention, not that they redescribe it. This Court has accordingly held, in the case of *Shull Perforating Co. v. Cavins*, 9 Cir. 94 F. 2d 357, 364, that 'where the means referred to in claims are clearly shown in the description of the patent, this description is sufficient to cover the means thus disclosed and its mechanical equivalents.' In conformity with this view, we hold that the present patent is sufficient in form to cover the latch-releasing means described in the specifications, and mechanical equivalents thereof."

In *Shull Perforating Co., Inc., v. Cavins, et al.*, 94 F. 2d 357, this Court, again speaking through Judge Wilbur, said at page 364:

"The patentee is entitled to have the claims of the patent construed with reference to the drawings and specifications. Where the means referred to in claims are clearly shown in the description of the patent, this

description is sufficient to cover the means thus disclosed and its mechanical equivalents. Walker on Patents, 6 Ed., vol. 1, p. 195, paragraph 162a. This was this court's holding in *Henry v. City of Los Angeles*, *supra*. (9 Cir. 255 Fed. 769.) See, also, *Wessel v. United Mattress Mach. Co.*, 6 Cir., 130 F. 11, 15."

The "means" referred to in the patent in that suit was "means for effecting a delayed movement of the valve away from its seat." Thus this is a holding that the use of the word "means" entitles the patentee to the means shown and described in the patent and the mechanical equivalent thereof.

At pages 54 to 62, inclusive, of Appellant's Opening Brief it was fully shown that appellees' accused structure embodies the "means" referred to in this element that are shown and described in this patent in suit or the mechanical equivalent thereof.

Manually Operable Means for Relieving the Fluid Pressure on Said Diaphragm.

This manually operable means is shown at 78 and 78A in Figure 2 in the lower right hand corner of Exhibit 9. It operates in substantially the same manner and produces identically the same result as the manual release means 78 and 78A in Figure 6 of the patent in suit, No. 2,233,395, shown opposite thereto.

This element was described at lines 34 to 36 in column 2, page 2 of the specification of this patent in suit and infringement thereof was pointed out at pages 74 to 75 of the Record on this appeal.

The foregoing clearly shows infringement by appellees' accused structure of claim 1 of this patent in suit, No. 2,233,395.

In the face of this clear infringement, appellees do not anywhere in their brief deny that their accused structure includes all of the elements described in this claim 1 of this patent in suit, No. 2,233,395.

Therefore, they in effect concede that the Lower Court was in error in holding that this claim is not infringed by their accused structure.

Some Fallacies in Appellees' Brief.

Before disposing of the prior art in evidence herein appellant will first clear up some of the more glaring fallacies made by appellees in their brief.

1. Appellees' "Pioneer Patent" Fallacy.

Appellees assert throughout their brief that appellant contends that one or both of the patents in suit is a "pioneer" and they even assert, without any foundation whatsoever, at page 2 of their brief that appellant admits that:

"Unless the patents in suit are pioneer in character they cannot be interpreted broadly enough to be infringed by the appellees' structures."

The utter falsity of this is seen by examining Appellant's Opening Brief carefully and noting that the appellant does not at any place therein assert that either patent in suit is a "pioneer." In fact the word "pioneer" does not appear even once in Appellant's Opening Brief.

Instead, appellant correctly stated (Appellant's Op. Br. pp. 8-9 and 55) that the patents in suit each represent a *substantial advance* in the art, and because of this *substantial advance* they are entitled to a *liberal interpretation* of the claims in issue.

A patent for a meritorious invention is always given a liberal interpretation by the courts, whether or not it is a "pioneer." (*National Battery Co. v. Richardson*, 63 F. 2d 289 at 293.)

There is no doubt that the inventions here in suit are "meritorious" and that they made a distinct step in the progress of the art.

Therefore, they are entitled to a "*liberal construction*" under the authorities cited at page 9 of "Appellant's Opening Brief."

2. Appellees' Fallacy That They May Attack the Validity of the Patents in Suit.

On pages 12 to 13 of Appellant's Opening Brief appellant pointed out that *appellees may not attack the validity of the patents in suit* because they did not cross-appeal. The law cited at pages 12 and 13 of Appellant's Opening Brief holds this clearly and is not disturbed by the law cited at pages 8 to 9 of Appellees' Brief which merely holds

that this Court has the *power*, on its own initiative, to declare any patent before it invalid. Appellant has never denied this, as will be seen by *reading* "Appellant's Opening Brief."

Appellant merely pointed out that the *appellees* cannot attack the validity of the patents in suit because they did not cross-appeal.

If this were not so a cross-appeal would be meaningless and an utterly futile procedure. Also, it would not be fair to permit the appellees to attack the validity of the patent without cross-appealing and paying half of the cost of the appeal.

If appellees had wanted to question the validity of the patents they should have cross-appealed and paid half the costs on this appeal in the first instance.

They refused, or failed to do so and they cannot obtain the same results by this illegal method.

Therefore, under the authorities cited at pages 12 and 13 of Appellant's Opening Brief, appellant now hereby moves to strike from the record all of the parts of Appellees' Brief which attack the validity of the patents in suit herein.

In support of this Motion appellant submits the following:

In *Tjosevig v. Donohoe*, 262 Fed. 911, Judge Gilbert of this Court says at page 918:

"The appellees, not having appealed from the decree awarding them affirmative relief, cannot review the denial of a portion of the relief which they sought. (Citing cases.)"

In *Gay v. Focke*, 291 Fed. 721, Judge Hunt of this Court, with Judges Gilbert and Rudkin concurring, says at page 727:

"No appeal having been taken from the decree of the Supreme Court by the life tenants or the trustees, they will not be heard to say that the Supreme Court was in error in holding that there is a distinction between the proper construction to be put upon the will as to the two leases. We are therefore limited to the second question presented by appellants." (Citing cases.)

In *Sanborn-Cutting Co. v. Paine*, 244 Fed. 672 at page 681, Judge Hunt of this Court, with Judges Gilbert and Ross concurring, said:

“As the trustee took no appeal from the decree of the District Court, we may not consider the point made in his brief that the Court erred in not making the allowance referred to. (Citing cases.)”

In *Construction Co. v. Maryland Casualty Co.*, 300 U. S. 185, 81 L. Ed. 593 at 597, 598, the Supreme Court of the United States says:

“Without a cross-appeal, an appellee may ‘urge in support of a decree any matter appearing in the record although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it.’ *United States v. American Railway Express Co.*, 265 U. S. 425, 435, 68 L. Ed. 1087, 1093, 44 S. Ct. 560. What he may not do in the absence of a cross-appeal is to ‘attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below.’ *Ibid.* The rule is inveterate and certain.” (Citing cases.) . . .

“‘Where each party appeals each may assign error, but where only one party appeals the other is bound by the decree in the court below, and he cannot assign error in the appellate court, nor can he be heard if the proceedings in the appeal are correct, except in support of the decree from which the appeal of the other party is taken.’ *The Maria Martin (Martin v. Northern Transport Co.)*, 12 Wall. 31, 20 L. Ed. 251, *supra.*”

The appellees’ complete disregard of rules should not be tolerated or allowed to pass unnoticed by this Court.

The alleged use of the asserted 1932 structure was not pleaded as a defense. Therefore it cannot be used as an anticipation. 35 U. S. C. S. 69 (5).

This was HELD by the trial court [R. p. 14 herein] and the appellees did not appeal nor cross-appeal from this holding.

Yet the appellees' whole brief is SHOT THROUGH with references to this incompetent, irrelevant asserted 1932 matter, just as if they had pleaded it.

Had they pleaded it, appellant would have brought evidence from his home in Louisiana carrying his dates back.

It would be unfair and contrary to the rules to now permit appellees to argue this asserted 1932 structure. All reference to it should be stricken from this case and it should be completely disregarded by this Court.

This is similar to the appellees' complete disregard of the holding of the Supreme Court of the United States in *Construction Co. v. Maryland Casualty Co.*, 300 U. S. 185, 81 L. Ed. 593, 597-598, *supra*, and the holdings of this Court, quoted immediately hereinabove, which specifically hold that the appellees may not attack the decree in the absence of cross-appeal.

All attacks by appellees on the validity of the patents in suit should be stricken from their brief and they should be promptly stopped if they attempt to argue orally at the oral hearing that the patents in suit are invalid. This should be done with great firmness under the decisions of this Court and the decision of the Supreme Court in *Construction Co. v. Maryland Casualty Co.*, *supra*.

3. Appellees' Fallacy of Patenting Results.

Throughout Appellees' Brief they seek to infer that appellant invented a result and that he did not get any claims to cover that result. A typical statement like that is found on page 13 of Appellees' Brief, as follows:

"All of the discussion in Appellant's Brief about the importance of warning the fireman *before* the boiler was shut down has nothing whatsoever to do with this case because appellant was not awarded any claims whatsoever covering that idea."

Obviously, it is not possible to patent a result. The only thing that is patentable is the *means* by which that result is accomplished. In this case, appellant secured claims covering the *means* by which this most beneficial result is obtained. It is sheer waste of time for appellees to urge that appellant did not patent this *result*, as it is impossible under elementary patent law for anyone to patent any result.

4. Appellees' Fallacy of "Broadened Claims."

In various places in Appellees' Brief they assert that appellant attempted to get broad claims in the file wrappers of the patents in suit, but then did not secure them, and that appellant is now seeking to broaden the claims that he did secure to cover such asserted cancelled claims.

However, appellees do not point out a single claim in either file wrapper to illustrate this point, because such claims are not present.

In this case there is no prior cancelled claim that in any way casts a shadow of a restriction on the issued claims in suit herein. Appellees' vague, general charges will not evade the clear infringement of the valid claims in issue herein.

5. Appellees' Check Valve 79 Fallacy.

Appellees tried to insert check valve 79 into claim 1 of patent in suit No. 2,233,395 (Appellees' Br. pp. 28-30, *et al.*), but this cannot be done, as a mere reading of the claims shows clearly that this check valve is not an element of this claim.

This is clear fundamental law. It is stated in the leading patent textbook, Walker on Patents, Deller's Edition, Section 241 at page 1207, as follows:

"A claim will not be narrowed by importing into it, by construction, any dispensable element, in order to enable an infringer to escape the consequences of his infringement. (Lamson Cash Ry. Co. v. Keplinger, 45 Fed. 245, 249, C. C., Ohio; Crown Cork & Seal Co. v. Sterling Cork & Seal Co., 217 Fed. 381, 386, C. C. A. 6.)

This law effectively answers appellees' attempts to read check valve 79 into claim 1 of patent in suit No. 2,233,395 by construction.

6. Appellees' 1932 Fallacy.

Another fallacy constantly reiterated by appellees in their brief is that their 1932 structure and their accused structures are the same. This is an absolute falsity and appellees themselves admit that they changed their 1932 structure to produce their accused structure. An illustration of this is found at page 6 of their brief, where they say:

"In producing the accused structure the appellees . . . added an extra needle valve to their 1932 structure . . . and connected the second valve to the float arm."

This admission alone shows the two structures are different. Comparison of the two structures shows that they are entirely different and achieve entirely different results. The accused structure accomplishes the results of the patents in suit. The 1932 structure does not.

Another place in Appellees' Brief where they admit that their 1932 structure is not the same as their accused structure is at page 40 of their brief, where appellees say:

"To meet this need the appellee Pinkerton in 1937 . . . modified his 1932 structure to delay the action of the fuel shut off valve until after the alarm whistle had blown."

This admission alone shows that appellee Pinkerton varied and modified his non-infringing asserted 1932 structure to produce the accused structure, which is a clear infringement of both patents in suit.

Appellee Pinkerton admitted that he had seen one of the appellant's patented structures at least as early as "late '38" and that he had seen their catalogues "approximately around the same time." [Tr. p. 267.] Obviously he designed his accused structure after he saw the appellant's patented one.

Appellee Pinkerton never obtained a patent on his structure. Nor did he even apply for one at any time as far as this record shows. He simply copied the appellant's structure.

Summary.

With these matters cleared up appellant will now show that the patents in suit are clearly valid and that the above interpretation of them which shows clear infringement does not render any claims invalid because of any prior art structure.

The Prior Art.

A. IT MAY BE DISREGARDED.

When the appellee Pinkerton was sued for infringement he did not know what the patents in suit covered, for he did not know what they covered even when he came to

the trial. He merely hired a lawyer to try to get him out of his infringement and he "left that to Mr. Fulwider." [R. p. 280.]

By the time that appellees' attorney was called into the case the appellees' accused structure had been on the market for some time and no change was made in this Chinese copy of the appellant's structure. Instead, the appellees' attorney made a search of the Patent Office and found all of the references cited in the file wrappers of the patents in suit and a few cumulative references, but even appellees' astute counsel did not dare to put a witness on the stand to try to explain these references or compare them with the patents in suit, as it was obvious that on cross-examination such a witness would have been forced to admit that the prior art did not in any way affect the clear infringement and validity of this patent in suit.

Appellees do not quote or cite a single line of testimony from the Record in this case in their brief. Instead their entire brief is mere windage—written arguments from prior art patents dumped into the Record.

Under these circumstances this Court can completely disregard all of the prior art patents, if it so desires, under the following authorities:

In *Benbrow-Brammer Mfg. Co. v. Heffron-Tanner Co.*, 144 Fed. 429, the Court says at page 431:

"A large number of prior patents have been placed before this Court without evidence explaining them or their operation and it would be proper to wholly disregard them. *Waterman v. Shipman*, 55 Fed. 982."

In *Waterman v. Shipman*, 55 Fed. 982, the 2nd C. C. A. says at page 987:

"To sustain the defense of want of novelty the defendants have set up in their answer, and offered in evidence, a large number of patents prior in date to those of the complainant.

"*In the absence of any expert testimony to explain these patents, or indicate what they contain tending to negative the novelty of the complainant's patents, we do not feel called upon to examine them.*" (Emphasis ours.)

This was followed by the 2nd C. C. A. in *Bell v. McKinnon*, 149 Fed. 205, where the Court says:

"Anticipation is claimed, but the defense is only suggested by injecting a large number of prior patents into the record without any explanatory testimony.

"If an examination of the prior art were necessary to the decision of the case, we should not sustain the defense of anticipation upon such mere production of patents."

In *General Electric Co. v. Germania Co.*, 174 Fed. 1013, at 1015, the Court said:

". . . the defendant . . . has presented no evidence of the invalidity of the patent in suit, other than that *it has dumped into the case 16 patents in the prior art*, without a word of explanation or any expert testimony to show wherein or how, if at all, they disclose or anticipate the invention embraced in the patent in suit. . . . The complainant's testimony . . . is wholly uncontradicted, unless by inferences to be drawn from the patents alleged to show the prior art. In this situation the patents referred to, under the authorities, need not, and will not, be considered at length."

Not only did appellees fail and refuse to put any witness on the stand to explain the prior art patents they "dumped into the record," but when appellant, in rebuttal [R. pp. 293-302], explained away all the "best references" selected by appellees from their prior art exhibits, the appellees as a matter of course were afforded the opportunity to cross-examine appellant's witness and appellees refused to do so, saying:

"Mr. Fulwider: No cross." [R. p. 302.]

Appellees' refusal to cross-examine appellant's witness on appellees' prior art and appellees' refusal or failure to produce a witness of their own admit the correctness of appellant's views of appellees' prior art.

Certainly in view of this refusal this Court is justified under the above authorities in refusing to examine or consider these prior art patents.

Appellant will now dispose of the prior art that was "dumped into the Record" by the appellees in the court below.

B. PARKER PATENT NO. 1,965,052.

Replying to the points sought to be made by appellees in their brief regarding Parker, the first point is that Parker is not a "safety apparatus for boilers" but it is a mere steam boiler control and provides no means for shutting off the fuel until it is manually released. The fuel in Parker goes on and off with the fall and rise of the pressure, which is not true of the appellees' and appellant's devices in this case. In appellees' and appellant's devices, once the fuel is shut off it remains shut off until the manual release is operated by hand.

Also Parker does not have "a compartment." The cylinder shown in Figure 8 of Parker is not a "compartment." The piston 39 is not a *sealing* piston, as is proven by the fact that there is a drain valve 32 *below* it. The presence of this drain valve 32 demonstrates conclusively that the Parker piston 39 is not a *positive seal*, as is the appellant's diaphragm and the appellees' leather sealing means. Therefore, there is no "compartment" above a "diaphragm" in Parker.

The next element that is missing in Parker is a "diaphragm." As is pointed out hereinabove, the piston 39 in Parker does not effect a seal and it is not, in any sense of the word, an equivalent of the Blanchard diaphragm. This is proven by the presence of the drain cock 32 *below* the Parker piston 39. Also, the Parker piston 39 will move above the other drain on the right hand side of Figure 8, showing that there is no seal intended.

The next element of claim 1 of this patent in suit which is missing in Parker is "a protective liquid for said diaphragm in said compartment."

There is no way that any protective liquid could be retained above the piston 39 in Parker. Obviously, any liquid above the piston 39 will drain down and out the drain cock 32. The split piston ring will permit this drainage through its split.

On the other hand, there is no such drain cock below the diaphragm in the patent in suit or below the leather cups in the appellees' accused structure, as is seen by examining Figure 2 of Exhibit 9 in this case. It will be noted that the absence of any drainage means below the appellees' leather cup in Figure 2 of Exhibit 9 shows that the protective liquid is retained above this diaphragm. Also appellee Pinkerton admitted his leather cup effects a seal. [R. p. 271.]

On the other hand, no protective liquid can be retained above the piston 39 in Parker and this element of this claim is clearly missing.

Means for Supplying Fluid Under Pressure to Said Compartment for Flexing Said Diaphragm and Moving Said Valve to Closed Position.

This means is totally absent in Parker. This means is fully described and its clear presence in appellees' accused structure is demonstrated at pages 54 to 62, inclusive, of Appellant's Opening Brief.

If this Court will merely compare pages 54 to 62, inclusive, of Appellant's Opening Brief with the appellees' accused structure and with the Parker patent it will be able promptly to see the validity and infringement of this patent in suit without further effort. This is the real crux of this patent in suit and appellant feels that his position was fully presented at pages 54 to 62 of his Opening Brief, which can be easily compared with the appellees' accused structure and with the Parker patent thus using *the same test* to show the infringement and validity of this element of this patent in suit.

Manually Operable Means for Relieving the Fluid Pressure on Said Diaphragm.

No such manually operable means is present in Parker.

The appellees' attempt to find it in "the petcock without number in the upper end of Parker cylinder 31" at page 26 of their brief is not borne out by the structure. The presence of the petcock 32 below the piston 39 and the split piston ring show that any pressure or fluid above piston 39 would drain out below and therefore that the unnumbered petcock in the right hand upper part of

Figure 8 of Parker cannot function as a “manually operable means for relieving fluid pressure” above a “diaphragm.” This is also true because there is no “diaphragm,” or the equivalent thereof, to maintain a pressure above the piston 39 in Parker.

Also, the piston in Parker No. 39 will move above the petcock without number in the upper end of the Parker cylinder. In the position shown in Figure 8 it is partly obstructing the opening now and a slight movement upward will totally obstruct that opening or cause it to open below the piston 39. Certainly this element is not met in Parker.

Obviously Parker was neither designed nor intended to do the work of this patent in suit and it could not be used to perform the function of this patent in suit. If a Parker structure were built it could not be sold to the modern oil well tool trade in competition with the appellant's and appellees' devices in this appeal.

Parker is an utterly impractical paper patent which has been resurrected from the Patent Office by appellees' attorney to try to get them out of the clear infringement that they perpetrated when they copied the appellant's patented invention.

C. THE REMAINING PRIOR ART.

The remaining prior art was disposed of by appellant in his Opening Brief and by the Patent Office in the prosecution of the patents in suit.

No prior art device can accomplish the new and beneficial results accomplished by the patents in suit and by appellees' embodiment thereof in their accused structure.

Summary and Conclusion.

Conclusive infringement and validity of the claims in issue herein have been completely shown.

Appellant respectfully urges this Court to grant him the relief prayed for in the Complaint herein, to which he is justly entitled.

Respectfully submitted,

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